NO. 86-1648

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JACK WEST, PHILIP B. THOMPSON,
GEORGE M. DAVIES, et al.,
Petitioners,

vs.

MULTIBANCO COMERMEX, S.A., BANCOMER, S.N.C.,
and BANCO NACIONAL DE MEXICO, S.A.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

R. J. Wolf
Civic Center Box 4307
San Rafael, California 94903
(415) 485-0321

Counsel for Petitioners

TABLE OF CONTENTS

	page:
Supplemental Brief	1
Letter from Joseph Gold of the International Monetary Fund to Charles E. Brown, Esquire	6

TABLE OF AUTHORITIES

Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974)	4
United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801)	4
STATUTES	
Mexico's General Law of Securities and Credit, Article 267	2, 3 7
Transitory Articles of Mexican Law, Article 3, Section 2	3

SUPPLEMENTAL BRIEF

An intervening circumstance of substantial and controlling effect has just occurred and come to the attention of petitioners.

According to information from the General Counsel to the International Monetary Fund (letter reproduced in full following brief), the Supreme Court of Mexico in Case No. 676/84 just decided that the exchange control decree adopted by Mexico in September 1982 and pursuant to which the dollar-denominated deposits in the cases at bar were eliminated is invalid and unconstitutional as applied retroactively to foreign currency deposits made prior to its enactment. As respondents' brief at page 1 concedes, petitioners made "dollar-denominated deposits with the respondent banks in Mexico prior to August 12, 1982 ..." Those deposits at issue here are directly affected and preserved

by this brand new decision of the highest court in Mexico.

More specifically, that Court appears to have held the exchange control decree violated Mexico's constitutional prohibition on impairment of contracts (or retroactive legislation) and Article 267 of Mexico's General Law of Securities and Credit that has always required the repayment of foreign currency deposits in kind. That the dollar depositors here were entitled to prevail on the merits of their claims because their deposit agreements were breached and their deposits were taken pursuant to an illegal decree was presented to but ignored by the court of appeals below. Because jurisdiction was predicated upon both the "commercial activities" and the "taking" exceptions to sovereign immunity [there was also inherent diversity], and because the exchange control decree was the sole basis and defense for

respondents' breach of their commercial obligations and for their taking of the depositors' dollars, the invalidity of that decree eliminates the defense. At pages 20 and 21 of their reply brief to the court of appeals, petitioners explained,

> Article 267 of the General Law of Securities and Credit of Mexico [provides]: "The deposit of a given amount in national currency or in foreign moneys or currencies, transfers the property to the Depository [bank] and obliges the Depository [bank] to return the deposited sum in the same kind ..." [emphasis added]
>
> Article 267 is "still in effect", and Art. 3, ¶2 of the Transitory Articles of Mexican Law pertaining to Article 267 provides, "All other laws and regulations that are contrary to this law are hereby revoked." CR 36 #0174; CR 36 #0155; CR 33 #6978.
>
> Article 267 requires the repayment of dollars in kind ... [T]he operative regulations are plainly violative of Article 267.

Obviously, as the exchange control decree and regulations thereunder are invalid and unconstitutional as applied to foreign cur-

rency deposited in Mexico prior to September 1982, the dollar depositors in the cases at bar are entitled to repayment in kind of their dollar deposits (as they always were), and are entitled therefore to prevail on the merits of their claims (dollars are now freely exportable from Mexico, Petitioners' Reply Brief, page 9). This Court must, of course, apply the law "in effect at the time it renders its decision", United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49 (1801, Marshall, C.J.); Bradley v. School Board of City of Richmond, 416 U.S. 696, 711-714 (1974).

The undersigned has ordered a copy of the Mexican Supreme Court opinion in Case No. 676/84, and will attempt to expedite its translation into English for presentation to this Court; but as it is over 75 pages in length, that will take considerable time. It is likely respondents already have an

English translation available as it was respondent Bancomer which was a party to that case.

In any event, petitioners most strongly urge that a writ of certiorari must issue to review the judgment and opinion of the Ninth Circuit that is now in conflict with Mexico's highest court on the merits of the claims of the dollar depositors, who, together with all petitioners, will have no further recourse.

RESPECTFULLY SUBMITTED,

R. J. Wolf
Civic Center Box 4307
San Rafael, California 94903

Counsel for Petitioners

(letter reproduced)

INTERNATIONAL MONETARY FUND

Washington, D.C. 20431

Cable Address
INTERFUND

May 6, 1987

Mr. Charles E. Brown
Brown, Ogline & Lundgren
Attorneys at Law
526 East Main Street
P. O. Box 2595
Alliance, Ohio 44601-0595

Dear Mr. Brown:

I am extremely grateful to you for sending me copies of the material relating to Reidel v. Bancam. I shall read it with great interest. I am collecting material for a fourth volume on exchange control and other legal problems of interest to the IMF. I hope to begin work on it after I complete a present project on exchange rates in international law.

Two days ago I received a copy of the judgment of the Mexican Supreme Court in Case 676/84. It is now being translated.

It is lengthy, and the translation will undoubtedly take some time, but I will send you a copy as soon as it is available.

Meanwhile, you might like to know that my Mexican friend [the lawyer who prevailed] writes to me about the case as follows:

> Basically, the subject matter was a case in which a person who deposited foreign currency with Bancomer, started an "amparo" proceeding arguing that the application of the exchange control rulings of September, 1982 violates [the] Mexican Constitution, which prohibits retroactive effects.
>
> Pursuant to the criterium of the Judge, the bank must reimburse the amount in foreign currency as provided for in article 267 of the General Law of Negotiable Instruments and Credit Transactions, because the deposit of foreign currency was created before the enactment of the exchange control decree of September 20, 1982.
>
> Against the decision of the Judge, an appeal (revision) was submitted before the Supreme Court. The Supreme Court confirmed the resolution of the District Court, although it based itself on procedural items without analyzing the substance of the problem.
>
> The main argument here was, as I mentioned above, that it was considered that the application of the decree of exchange control enacted on September

1982 cannot be applied to transactions executed before said decree because such applicability would imply granting retroactive effect to the decree, which is prohibited by the Constitution.

With best wishes,

Yours sincerely,

Joseph Gold
Senior Consultant